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Committee on the Elimination of Discrimination against Women

Communication No. 46/2012

Views adopted by the Committee at its sixty-third session (15 February-4 March 2016)

Submitted by:	M.W. (not represented by counsel)
Alleged victims:	The author and her child
State party:	Denmark
Date of the communication:	21 August 2012
References:	Decision of admissibility of 3 November 2014 (CEDAW/C/59/D/46/2012)
Date of adoption of views:	22 February 2016

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Annex

Views of the Committee on the Elimination of Discrimination against Women under article 7 (3) of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women (sixty-third session)

concerning

Communication No. 46/2012*

Submitted by:	M.W.
Alleged victims:	The author and her child
State party:	Denmark
Date of the communication:	21 August 2012

The Committee on the Elimination of Discrimination against Women, established under article 17 of the Convention on the Elimination of All Forms of Discrimination against Women,

Meeting on 22 February 2016,

Adopts the following:

Views under article 7 (3) of the Optional Protocol

1. During its fifty-ninth session, on 3 November 2014, the Committee declared the communication admissible. The decision of admissibility, contained in document CEDAW/C/59/D/46/2012, is being made public, together with the present views.

Additional information from the author

2. On 21 October 2014, the author asserted that the Danish authorities continued to ignore her queries concerning her son O.W. and her pending appeal. Her lawyer's requests for oral hearings in the pending appeal regarding the enforcement of the Austrian Supreme Court's decision had been denied. As the courts did not reply, she had filed a new application for leave to appeal to the Supreme Court in October 2014. She noted that her application for leave to appeal to the Supreme Court had

* The following members of the Committee participated in the examination of the present communication: Ayse Feride Acar, Gladys Acosta Vargas, Bakhita al-Dosari, Magalys Arocha Dominguez, Barbara Bailey, Niklas Bruun, Louiza Chalal, Naéla Gabr, Hilary Gbedemah, Nahla Haidar, Yoko Hayashi, Ismat Jahan, Dalia Leinarte, Lia Nadaraia, Pramila Patten, Silvia Pimentel, Biancamaria Pomeranzi, Patricia Schulz and Xiaoqiao Zou.
An individual opinion by Committee member Patricia Schulz (dissenting) is attached to the present views.
In line with rule 61 of the Committees rules of procedure, Committee member Lilian Hofmeister did not take part in the examination of the communication.

already been rejected six times. Her repeated requests for a copy of the records on her custody case from the Ministry of Foreign Affairs had met with no success. In October 2014, she had no other choice than to report several officials for abuse of office, defamation and discrimination to the Danish police. She added that she had recently discovered that her son had received no medical treatment for more than 860 days, but that she had received no response to her enquiry to the authorities of Fredensborg for information. On 1 October 2014, she was informed that she could obtain no further information about O.W. Lastly, she reiterated that O.W. had been severely traumatized by his kidnapping, but had received no assistance. She asserted that he had only recently, at 8 years of age, begun first grade at school, whereas children in Denmark normally began first grade at the age of 6.

State party's observations on the merits

3.1 On 8 June 2015, the State party explained that the Danish authorities had not violated the author's rights under the Convention. The matter did not, as claimed by the author, relate to the issue of whether the Danish authorities had discriminated against the author because she was a woman, but concerned a very unfortunate and complex case, where two legal systems had made contradictory custody decisions. The author was trying to obtain another review of issues, such as custody, already thoroughly evaluated by the national authorities. The State party also indicated that the Committee was not a supranational body with the task of ruling on disagreements between such recognized and equal legal systems.

3.2 The State party rejects a number of facts set out in paragraphs 2.1 to 2.3 of the Committee's decision of admissibility and observes that the Appeals Permission Board rejected the author's application for leave to appeal against the order of the High Court to the Supreme Court, on the ground that the condition that the case must concern a matter of general public importance had not been met.

3.3 The State party notes that, in March 2014, the author sought the enforcement of the custody order of the Austrian Supreme Court. On 10 July 2014, her request was denied by the Bailiff's Court of Helsingør, which noted that S. had been awarded custody by court order and that the circumstances had not changed since the Eastern High Court determined, on 21 December 2012, that, until 3 April 2012, when O.W. was brought back to Denmark, he had been domiciled and had his habitual residence in Denmark, and that his residence with S. could therefore not be considered unlawful retention under section 10 of the Danish Act on International Child Abduction. On 2 September 2014, the High Court upheld the order of the Bailiff's Court, agreeing with its reasoning.

3.4 The author subsequently applied for leave to appeal to the Supreme Court against the order delivered by the Eastern High Court. Her application was rejected on 13 November 2014, as the condition that the case must concern a matter of general public importance had not been met. On 6 April 2015, the author filed a request for reconsideration by the Board, which was denied on 21 April 2015, given that no essential new information had been provided.

3.5 On 1 October 2014, the Regional State Administration decided, upon an application filed by S., that the author would no longer be entitled to be kept informed about her son under section 23 of the Danish Act on Parental Responsibility. Under this provision, a parent who is not a joint custodial parent is entitled to request and receive information on circumstances relating to the child

from schools, child-care institutions, the social and health sectors, private hospitals, general practitioners and dentists. He or she is also entitled to receive a copy of any documents on the circumstances of the child that schools and child-care institutions may have. Under the same provision, the State may decide, in special situations, at the request of the custodial parent or any of the aforementioned institutions, to deprive the non-custodial parent of the entitlement to be kept informed and to request copies of documents. According to the State Administration's decision, S. had maintained in his request that it might be particularly harmful to the son's well-being if any kind of information on the son were disclosed to the author. S. further stated that the author published any and all information on the son on various Internet pages, campaign sites and Facebook, which he believed was not in their son's best interests.

3.6 The State party considers that the author's claims under articles 1, 2 (d), 5 and 16 (d) of the Convention are unsubstantiated. Concerning her claims under articles 1 and 2 (d), the author has provided no evidence or documents (such as copies of police reports) to support her assertions that S. abused, threatened, stalked and harassed her and that he has been violent towards her and O.W. Moreover, although the author asserts that O.W. was violently kidnapped on 3 April 2012, the Eastern High Court established on 21 December 2012 that O.W.'s habitual residence was in Denmark at the time of the kidnapping and continued to be in Denmark. O.W. was thus not unlawfully retained by S. Furthermore, in its decision dated 11 June 2012, the Ministry of Justice refused to surrender S. to Austria because the offence covered by the arrest warrant was regarded as having been partly committed in Denmark and was not regarded as a criminal offence in Denmark.

3.7 Concerning the author's claims under articles 5 and 16 (d), the State party considers that legislation in Denmark is gender-neutral as a principle and applies equally to women and men. Exemptions from this principle are granted in only a few cases, and only in specific circumstances such as where the purpose of the exemption is to meet a particular need of either women or men. Denmark makes about 24,000 decisions in cases on parental responsibility each year, under the Act on Parental Responsibility. Under the Act, in all decisions, the best interests of the child are of paramount importance. Danish legislation is also based on the principle that a child must have contact with both parents, regardless of their countries of habitual residence or nationality. The Act stipulates that the predominant principle is the child's right to access to both parents, not the parents' right to access to the child. Accordingly, the Act is in full compliance with the State party's international obligations, including those set forth in the Convention, the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights) and the Convention on the Rights of the Child.

3.8 The State party refers to paragraph 8.6 of the Committee's decision on admissibility and contends that the author's assertion that since 7 September 2010 a Danish court had confirmed that her move to Austria was legal and that she had sole custody of O.W, is misleading. Custody had, in fact, been transferred to S. on 22 December 2010. Furthermore, the preliminary statutory hearing on 7 September 2010 concerned only the issue of whether there was any basis for remanding the author in police custody, as the author had been provisionally charged with violating section 215 of the Criminal Code at that time. As mentioned in the State party's observations of 14 January 2013, the author was released.

3.9 Regarding the author's assertion that the Danish police terrorized her by arresting and wrongfully imprisoning her without due process, the State party considers that there is no basis for this claim, given the information presented in its observations of 14 January 2013, as set out in paragraph 4.4 of the Committee's decision of admissibility. The State party emphasizes that the author was represented by assigned defence counsel at the court hearing on 21 December 2011, at which she was not present herself, and that counsel had the opportunity to represent her interests during the proceedings.

3.10 Concerning the Committee's position that the author had no opportunity to attend court hearings in Denmark because she justifiably feared being imprisoned upon her return to the country, the State party comments that the author was arrested by the North Zealand Police on 6 September 2010 and charged with violating section 215 of the Criminal Code. On 7 September 2010, she was arraigned before the District Court of Helsingør for a statutory hearing at which the prosecutor requested that she should be remanded in custody. The District Court found no basis for remanding her in custody, and consequently she was released. The North Zealand Police have subsequently requested on three occasions that the author should be remanded in custody, in absentia, for the purpose of issuing a European arrest warrant. The Eastern High Court found by orders of 24 May, 19 July and 23 December 2011 that the conditions for doing so had not been satisfied. In those circumstances, the author risked being arrested between 7 September 2010 and 23 December 2011 if she returned to Denmark. However, under section 771 (2) of the Danish Administration of Justice Act, a remand prisoner may be granted accompanied leave for a short time (e.g., to attend court proceedings with an escort) if justified by special circumstances and if the police have consented to such leave. The North Zealand Police have stated concerning the matter that they would have transported the author to court for the civil proceedings in accordance with the usual procedures to allow her to defend her interests despite her detention.

3.11 Concerning the period following 23 December 2011, the State party emphasizes that the Public Prosecutor ceased to request the author's detention after the Eastern High Court made its order of 23 December 2011. The author was thus not at risk of imprisonment after 23 December 2011. The Division of Family Affairs of the National Social Appeals Board informed the Austrian Ministry of Justice on 17 July 2012 that the author was not in fact at risk of being arrested in connection with the child abduction case if she travelled to Denmark for two hearings on 4 and 6 September 2012 before the District Court of Helsingør concerning her request for the surrender of her son. Subsequently, on 18 July 2012, the Board resent to the Austrian Ministry of Justice an opinion dated 17 July 2012 from the Prosecutor's Office at the North Zealand Police. In the opinion, the North Zealand Police confirmed that the author was not in fact at risk of arrest or a request that she be remanded in custody on charges of violating section 215 of the Criminal Code (child abduction) should she enter Denmark, including in the period from 31 August to 9 September 2012.

3.12 The State party contends that the author has made numerous unsupported allegations against the Danish authorities and individual officials involved at all levels of the national proceedings. The material that the author submitted concerning the proceedings proves that her claims and submissions have been taken seriously and been the subject of evaluation and review by the relevant national

bodies. The municipal authorities, the Regional State Administration, the police, the Prosecutor and courts have regularly examined, assessed and ruled on the matter.

3.13 Regarding the access to the author's son, the State party refers to its additional observations dated 9 August 2013, adding that, from August 2013 to December 2014, the author made repeated requests to the Ministry of Children, Gender Equality, Integration and Social Affairs for access to her son on specific dates. It appeared from all those requests that the request for access was directed to the State party, and could by no means be seen as an application for visitation to the Regional State Administration. On 2 August 2013, 17 December 2013, 15 April 2014, 7 May 2014 and 5 May 2015, the Ministry informed the author by e-mail that the State Administration was the only authority with the competence to make decisions concerning access. The Ministry has also informed the author that, since she has informed the Ministry that her request cannot be seen as an application for access to the State Administration, no decision on her access to O.W. can be taken and the authorities cannot therefore help her establish personal contact with her son. Because the author does not want the State Administration, which is the only authority with the competence to make decisions concerning access, to process her application for access to O.W., the State party has been unable to provide the author with reasonable access to O.W. in Denmark, as requested by the Committee on 9 July and 4 April 2014.

3.14 Concerning O.W.'s safety, the State party refers to the information presented in paragraph 6.2 of the Committee's decision of admissibility. It adds that, in the second quarter of 2013, the Ministry of Children, Gender Equality, Integration and Social Affairs received another request from the Austrian authorities concerning O.W.'s well-being. As requested by the Austrian authorities, that request was forwarded to the local authorities in Fredensborg. O.W.'s safety is thus adequately ensured by the Danish social authorities. Moreover, under Danish law, all public employees have an enhanced duty to inform the social authorities if they become concerned about the well-being of a child.

Author's comments on the State party's observations on the merits

4.1 On 11 August 2015, the author asserts that the Danish authorities removed her and her son's names from the Danish Civil Registration System on 17 July 2010, and therefore recognized them as Austrian residents. The Regional State Administration could not transfer temporary sole custody of her son from a foreign mother to a Dane. On 13 October 2014, she filed a complaint with the police against officials for giving false allegations concerning the citizenship of her son and for illegally registering him as a Danish resident. Her complaints had been systematically ignored by the Danish authorities. The Austrian Supreme Court held that she has always been the sole custody holder.

4.2 The author reiterates that her rights under articles 1, 2 (a) to (f), 3, 4, 5 (a) and (b), 9, 15 (1) and (4), and 16 (d) to (g) of the Convention have been violated.

4.3 She further asserts that a caseworker from the Danish Central Authority or Family Affairs Department has telephoned the Austrian Family Affairs Department several times and illegally threatened the author that she should withdraw her request for O.W.'s return because she had no chance of ever seeing her own child again.

4.4 S. had no agreement on visitation rights. The author further states that S. did not maintain his custody application dated 2 July 2010, as averred by the State party. Rather, he withdrew his application for joint custody on 19 July 2010 and then filed a new application for sole custody on 22 July 2010. The author informed the Danish authorities and S. in advance that she would be moving to Austria. S. had known about that since 2009, and the Danish National Social Appeals Board, which assisted foreign parents in recovering their children under the Hague Convention on the Protection of Children and Co-operation in Respect of Inter-Country Adoption, confirmed this in a statement of 16 April 2012. S. confirmed that he was aware of the author's relocation to Austria with O.W. in a telephone conversation between him and O.W. on 19 July 2010. He sought advice on 6 May 2010 concerning his custody and visitation rights. He also wrote blog entries on 14 May and 26 May 2010 stating that the author wanted to quit her job, sell the house and return to Austria. On 8 August 2011, on national television, S. again confirmed this.

4.5 Concerning the State party's observation that, on 7 September 2010, she was arraigned for having violated S.'s custody rights, the author reiterates that a judge has closed the case, confirming the legality of her move to Austria. She was registered in Austria and O.W. had been registered there on 19 July 2010, and no Danish court had jurisdiction over her case on 22 July 2010.

4.6 O.W. has not received proper care and S. sends shocking videos to her, showing that O.W. is engaging in regressive behaviour. On 5 September 2012, she saw O. briefly, in the presence of S., and the child behaved as though he was severely traumatized. Concerning telephone contact with O., the author asserts that, while initially she was able to call her son daily, subsequently she was allowed only one telephone call per week, if any. The author also avers that, since 13 February 2013, she has had no contact with O.W.

4.7 Concerning her arrest, the author maintains that, in September 2010, she went to Denmark to meet a real estate broker. On 6 September 2010, S. stormed into her house, asking for his son's return. After she requested him to leave several times, he finally left. Half an hour later, the author was arrested by the police, who searched her house. From around 11 a.m. to 6.30 p.m., she was held at a police station until she was taken to the worst female jail in Copenhagen. According to her, until the next day, after a court hearing, she was treated like the worst criminal. She was offered only some water and a piece of candy by the police officer who questioned her. On her arrival at the jail, a female officer executed a complete body search. The officer left the room and made bad jokes about the author and her belongings with another officer, even after the author made it clear that she could hear. The author asserts that this was an extreme assault. The same day, two of the author's friends visited S. at his home; he acknowledged that he obviously enjoyed that the author had been imprisoned. On 7 September 2010, the police took her to the Helsingør District Court, where the judge confirmed that she had sole custody.

4.8 The author's case before the Helsingør District Court was decided by a *retsassessor*, not a judge. The *retsassessor* never spoke to her, but nevertheless accused her of being solely interested in herself and of having no empathy. According to the author, he never took into account O.W.'s best interests; gave her no visitation rights; and falsely stated that she had received three invitations to appear in court, whereas she received none.

4.9 The author claims that the Regional State Administration disregarded the best interests of her child and based its decision only on S.'s story. Specifically, the State Administration accepted at face value S.'s allegation that he had been O.W.'s primary caregiver, but failed to consider that S. had paid child support for O.W. until July 2010; that O.W. had always resided with the author; that O.W.'s mother tongue was German and not Danish; and that the author had custody of O.W. according to Austrian and Danish law. The author reiterates that the State Administration based its decision on a false statement by O.W.'s kindergarten teacher, who must have a close relationship with S. as S. had stated that she knew exactly what information S. had forwarded to the author. The author also claims that the deciding official of the State Administration committed an abuse of office by determining that the State Administration had the competence to decide on S.'s custody application. She believes that the State Administration applied a discriminatory double standard by denying her the right to have information about O.W. on the ground that she would publish it on the Internet, whereas S. and his helpers have since 2010 used a variety of media to publish defamatory comments about the author. The author states that she will continue to publish everything about the case, as transparency is the only way to ensure that her child will be returned to her. She alleges that the State party supports only its nationals, without protecting children from abusive Danish parents,[1] and that the State Administration has shown a pattern of accusing foreign mothers of fabricating stories. The author claims that the State Administration's decision was full of lies and inaccuracies.

4.10 The author asserts that the State party has demonstrated bad faith by repeatedly requesting extensions from the Committee and providing incorrect and contradictory observations. She maintains that the discrimination that she and O.W. have faced from the State party is evidenced by, among other things, official findings of the European Parliament.[2]

Issues and proceedings before the Committee concerning the merits

Consideration of the merits

5.1 The Committee has considered the present communication in the light of all the information made available to it by the author and by the State party, as provided for in article 7 (1) of the Optional Protocol.

5.2 The Committee notes that the author's claims under articles 1 and 2 (d) of the Convention are grounded in the alleged gender-based violence perpetrated by S. towards her and her son, the biased proceedings conducted by the Danish authorities and courts, the discrimination against her on the basis of her sex and her foreign nationality, and the failure of the State party to take appropriate and immediate steps to protect her and her son O.W. and to put an end to the alleged discrimination against them.

[1] The author cites excerpts from Libbie Bouffon, *The Biggest Power Pig Wins — on Custody Law, and How to Protect Yourself from the Game*.

[2] The author cites the European Parliament Committee on Petitions, working document on the fact-finding visit to Denmark 20-21 June 2013 (17 September 2013), available from www.europarl.europa.eu/meetdocs/2009_2014/documents/peti/dt/1003/1003121/1003121en.pdf (in which it is stated, inter alia, "As regards equal treatment of Danish and non-Danish parents it was acknowledged that this was a serious problem. However, the Danish authorities did their utmost to mediate between parents and obtain an agreement in the best interest of the child. If there is no agreement the court decides and there was no reason to assume that Danish courts discriminate against foreign parents.").

5.3 The Committee recalls that it does not replace the national judicial authorities in the assessment of the facts and evidence, unless the assessment was clearly arbitrary or amounted to a denial of justice.[3]

5.4 The Committee recalls that, in accordance with paragraphs 6 and 9 of its general recommendation No. 19 (1992) on violence against women, the definition of discrimination in article 1 of the Convention includes gender-based violence, and, further, that States may be responsible for private acts if they fail to act with due diligence to prevent violations of rights or to investigate and punish acts of violence.[4]

5.5 The Committee notes the author's detailed allegations that, during her cohabitation with S., after their separation and even after she moved to Austria, she was subjected to verbal and physical violence, harassment and stalking by S., and that O.W. was violently kidnapped by S. in Austria. The Committee further takes note of the author's contention that the law enforcement authorities not only failed to protect her against the threats, stalking, harassment and mental and physical abuse of S., but also discriminated against her as a foreign woman, as when she reported a break-in at her home by S. on 6 September 2010 to the police, but that they did not take her version of events into account and instead arrested and detained her without due process for allegedly illegally taking O.W. out of the country, even though she was the sole custody holder; and that the police refused to investigate her claim that S. had trespassed on her property and threatened her in her home. The Committee also takes note of the details provided by the author concerning the inhuman and degrading treatment meted out to her during her detention on 6 September 2010, such as the forced stripping and complete body search carried out on her by a female officer, in addition to the denial of access to legal counsel. The Committee has also given due consideration to the actions of the Danish authorities, such as how the North Zealand Police acted solely on the version of S. and charged her under section 215 of the Criminal Code; how, when she was arraigned before the District Court of Helsingør on 7 September 2010 for a statutory hearing, the Prosecutor requested that she should be remanded in custody and that, although the District Court found no basis for remanding her in custody and that she was released, the North Zealand Police have requested on three subsequent occasions that the author be remanded in custody, in absentia, for the purpose of issuing a European arrest warrant.

5.6 With regard to the violent kidnapping of O.W. by S. in Austria, the bias of the Danish authorities, including its judiciary, and the lack of an effective response to the kidnapping of O.W., the Committee takes note of the author's contention that the Danish authorities have completely ignored the international arrest warrant issued by the Austrian authorities against S., under which he is charged with the serious assault and kidnapping of O.W., and all her requests to be provided with access to the child and for O.W.'s safety to be ensured since the kidnapping and that, in the process, they have damaged a previously completely healthy and well-developed child in order to cover up the fact that they violated international and Danish law

[3] See, inter alia, communications No. 37/2012, *T.N. v. Denmark*, decision of inadmissibility adopted on 3 November 2014, para. 12.7; and No. 34/2011, *R.P.B. v. the Philippines*, views adopted on 21 February 2014, para. 7.5.

[4] See also communication No. 6/2005, *The Vienna Intervention Centre against Domestic Violence and the Association for Women's Access to Justice on behalf of Banu Akbak, Gülen Khan, and Melissa Özdemir*, views adopted on 6 August 2007, para. 12.1.1.

when removing custody of the child from her and granting it to S. in 2010. The Committee also takes note that, while, on 16 April 2012, the National Social Appeals Board did request the Bailiff's Court of Helsingør to consider handing over O.W. to the author in Austria, on 21 September 2012, the latter issued an order in which it dismissed the author's request to have O.W. handed over; that the said order was upheld on appeal to the High Court of Eastern Denmark; and that the author's subsequent applications to the Appeals Permission Board for leave to appeal against that decision to the Supreme Court were systematically denied.

5.7 The Committee notes that the State party's contention that the author's allegations concerning S.'s violent behaviour towards her are unsubstantiated inasmuch as she has not provided evidence or documents to support her assertions that S. abused, threatened, stalked and harassed her and has been violent towards her and O.W. The Committee notes that it was difficult for the author, from Austria, to submit such documents, especially since all her requests for documents from the Danish authorities have been ignored and/or denied. Besides, the Committee observes that the State Party has itself failed to provide detailed information and documents concerning the acts and omissions of the police, especially the author's arbitrary arrest and detention on 6 and 7 September 2010; and the failure of the law enforcement authorities to take action against S. for trespassing on the author's property and his threatening behaviour. The Committee is of the view that, in the present circumstances, the Danish authorities, more especially the police, the Prosecutor and the courts, have not only completely failed to provide effective protection to the author and O.W., of whom the author had lawful custody, but that they have also engaged in a series of wrongful acts and doings, inter alia the transfer of custody of O.W., albeit temporary, from the author to S. in ex parte proceedings, during the course of which the Regional State Administration relied solely on the version of S; the transfer of O.W.'s custody to S. by the District Court of Helsingør on 22 December 2010, again solely on the basis of a statement of facts by S., which contained erroneous facts such as that S. was the primary caregiver of O.W., and the clear failure on the part of both authorities to take into account the best interests of O.W.; the arbitrary arrest and detention of the author in September 2010 and her arraignment under section 215 (2) of the Danish Criminal Code and the withdrawal of the charge against her over two years later on 20 December 2012, as a result of which she could not attend custody proceedings for fear of being imprisoned and was thereby denied access to justice. With regard to the kidnapping of O.W by S. in Austria, the Committee also takes note of the lack of collaboration on the part of the State Party with the Central Authority in Austria and its refusal to surrender S. to the Austrian authorities pursuant to the international arrest warrant issued on 3 April 2012. The Committee recalls that, under the Hague Convention, central authorities have a duty to cooperate with each other and to secure the prompt return of children wrongfully removed and to ensure that rights of custody and of access under the law of one contracting State are effectively respected in the other contracting State. The Committee also expresses its concern at the poor justification provided by the Ministry of Justice, acting as the Danish Central Authority, for its refusal to surrender S. to Austria further to the issue of an arrest warrant by the Austrian authorities on 3 April 2012 in relation to the abduction of O.W. by S., on the ground that, first, since O.W. had remained in the custody of S. in Denmark, the offence covered by the arrest warrant was regarded as having been partially committed in Denmark, and, second, that the count was not regarded as a criminal offence in Denmark because S. had custody of O.W. under Danish law.

5.8 In those circumstances, the Committee concludes, on the basis of the information before it, that the State party has failed to exercise due diligence in preventing, investigating and punishing the acts of violence and in protecting the author and O.W. before and after the kidnapping. The Committee recalls that States parties have an obligation not to cause discrimination against women through acts or omissions and that they are obliged to react actively to discrimination against women, regardless of whether such acts or omissions are perpetrated by the State or by private actors. Similarly, States parties have an obligation to ensure that women are protected against discrimination committed by the judiciary and by public authorities. With regard to the contention of the author that she suffered discrimination as a foreign mother, the Committee further recalls that discrimination against women on the basis of sex and gender is inextricably linked with other factors that affect women, such as nationality, and that States parties must legally recognize such intersecting forms of discrimination and their compounded negative impact on the women concerned, and prohibit them. Accordingly, the Committee considers that the State party has violated the rights of the author and O.W. under article 2 (d), read in conjunction with article 1, of the Convention.

5.9 The Committee also takes note of the author's claims under articles 5 (a) and (b) and 16 (1) (d) that the State party did not consider O.W.'s best interests when awarding custody to S. and discriminated against her as a foreign mother during proceedings relating to custody and visitation rights. The Committee recalls that, under article 5 (a), States parties have an obligation to modify the social and cultural patterns of conduct of men and women, with a view to achieving, inter alia, the elimination of prejudices and practices that are based on the idea of the inferiority or superiority of either sex or on stereotyped roles for men and women. Under article 16 (1) (d), States parties have an obligation to take all appropriate measures to eliminate discrimination against women in all matters relating to family relations, and to ensure that men and women shall enjoy the same rights and responsibilities as parents in matters relating to their children, taking into account that in all cases the interests of the children shall be paramount.

5.10 The Committee notes the author's assertions that, in removing custody of O.W from her and awarding it to S., the Danish authorities, acting through the Regional State Administration and the District Court of Helsingør, failed to give paramount consideration to the best interests of O.W. as well as to the legal rights of the author as the rightful custody holder, and thereby discriminated against her as a woman and as a foreign mother. Specifically, the Committee notes the author's claims of wrongful acts on the part of the Danish authorities, which failed to give due consideration to the following facts: that O.W. was solely an Austrian national, that S. had not even acknowledged O.W. when he was born; that although S. legally acknowledged the child on 22 May 2007, it resulted in no change to O.W.'s citizenship; that the author, as an unmarried mother, has always been the sole custody holder of O.W. under both Danish and Austrian law; that there has never been any agreement between her and S. concerning visitation rights for S. and that she and O.W. have never applied for Danish citizenship. The Committee also takes note of the author's contention that, while S. withdrew his application for shared custody on 19 July 2010 before the Regional State Administration and filed a new application for sole custody on 22 July 2010, the Danish authorities failed to take into account that it had no jurisdiction over an Austrian child born of an Austrian mother who had sole custody from birth. More importantly, the Committee takes

note of the author's assertion that both the Regional State Administration and the District Court of Helsingør failed to take O.W.'s best interests into account and relied exclusively on the biased version given by S; that the District Court of Helsingør based its decision on the principle that a child must have contact with both parents and was blatantly biased against the author as a foreign woman inasmuch as, while she never met and spoke to the *retsassessor*, who heard the case, the latter accused her of being solely interested in herself and of having no empathy and consequently did not even give her visitation rights to O.W. The Committee also takes note of the author's contention that, since 1 October 2014, the Regional State Administration has further divested her of all her rights as a mother pursuant to an application by S. under section 23 of the Danish Act on Parental Responsibility.

5.11 The Committee takes note of the information provided by the State party concerning the compliance of its Act on Parental Responsibility, with its international obligations, including those under the Convention and the Convention on the Rights of the Child, as well as its contention that, in the present case, the Regional State Administration had found that it would be in O.W.'s best interests to maintain the status quo and for him to remain in his usual environment and school in Denmark during the proceedings.

5.12 The Committee notes from the copy of the decision provided by the State party that the Regional State Administration itself stated that it had made no assessment as to what would be in O.W.'s best interests in the long term. With regard to the Act on Parental Responsibility, the Committee notes that, while in all decisions the best interests of the child are a paramount principle, Danish legislation is also based on the principle that a child must have contact with both parents, a consideration which weighed heavily in the decision given by the District Court of Helsingør, which concluded that, in view of the fact that the author's actions had resulted in O.W.'s being unable to see his father for more than four months, it would be in O.W.'s best interests to have S. retain full custody in order to ensure that O.W. has stable contact with both his parents. The Committee is of the view that, in both decisions, the courts failed to give paramount consideration to the best interests of O.W. and failed to adopt a balanced approach, thereby resulting in discriminatory treatment of the author. The Committee observes that the decision of the District Court of Helsingør refers to the need for stable contact with both parents, when it is fully aware that the author lives in Austria and did not even grant her any visitation rights. The Committee recalls its interim measures dated 9 July 2013 and 4 April 2014, whereby it requested the State Party to provide the author with reasonable access to O.W. in Denmark and to ensure that all appropriate authorities facilitated such access, and notes with concern that the State party has failed to do so, purportedly on the ground that the author ought to have submitted an application for visitation to the Regional State Administration, which, under Danish law, is the only authority with the competence to make decisions concerning access and that, therefore, since 13 February 2013, the author has had no contact with her child. The Committee is further concerned that, since 1 October 2014, the situation of the author has further deteriorated following the decision of the Regional State Administration, acting on another application by S, to the effect that the author would no longer be entitled to be kept informed about her son O.W., although, under section 23 of the Act on Parental Responsibility, a parent who is not a joint custodial parent is entitled to request and receive information on the child from schools,

child-care institutions, social and health sectors, private hospitals, general practitioners and dentists.

5.13 The Committee is of the view that the expression "paramount" in the Convention means that the child's best interests may not be considered on the same level as all other considerations. The Committee is also of the view that, in order to demonstrate that the right of the child to have his or her best interests assessed and taken as a primary/paramount consideration, has been respected, any decision concerning a child must be reasoned, justified and explained.

5.14 The Committee takes note of the State party's observations that the author was afforded adequate opportunity during custody proceedings to present her version of the facts but failed to do so; that the author would not have been arrested if she had attended court proceedings in Denmark as the Public Prosecutor ceased to request the author's detention after the Eastern High Court issued its order of 23 December 2011. The Committee also takes note of the circumstances in which the author was arbitrarily arrested and detained in September 2010, with inhuman and degrading treatment allegedly meted out to her during her detention, and is of the view that the author had a justifiable ground for not returning to Denmark for the custody proceedings, having reason to have lost all confidence in the fairness and integrity of the State party's authorities. The Committee recalls the letter transmitted to the Austrian Central Authority by the Ministry of Justice, Department of Family Affairs, Danish Central Authority, dated 18 April 2011, in which it confirmed that criminal proceedings were still pending against the author; that child abduction is a criminal offence punishable with a maximum sentence of 4 years imprisonment; that if the author travels to Denmark she risks being arrested, and that there might be a European arrest warrant for the author within a short time. The Committee has also taken note of the unchallenged averment of the author to the effect that intimidation tactics were used against her, including through several telephone calls made to the Austrian Family Affairs Department by a case worker from the Danish Central Authority/Family Affairs Department threatening the author to withdraw her request for the return of O.W. to Austria. The Committee is of the view that all those circumstances taken together not only explained the author's reluctance to come to Denmark for the proceedings but also constituted an obstacle to her access to justice.

5.15 The Committee further views with deep concern the systematic rejection of the author's applications to the Appeals Permission Board, which also constituted an impediment to the author's access to justice. In applying the "general public importance rule", the State party's authorities ought to have given due consideration to the nature of the case, namely the custody of a minor child of tender age; the international dimension of the case, with conflicting decisions from two different legal systems and the substantial and broad-based impact and consequences of the issue, to be canvassed on appeal, which transcend the litigation interests of the author, O.W and S., given the repeated averments of the author that she has suffered sex-based discrimination as well as discrimination on the basis of her foreign nationality and the fact that many foreign nationals are in a similar situation and indeed the number of complaints involving foreign parents in the same situation as the author.

5.16 On the basis of the information before it, the Committee concludes that the author did not enjoy equal treatment before the Danish authorities in matters

concerning her son. In the light of the foregoing, the Committee considers that the State party has violated the rights of the author and O.W. under articles 2 (d), 5 (a) and (b) and 16 (1) (d) of the Convention.

6. Acting under article 7 (3) of the Optional Protocol to the Convention, the Committee is of the view that the facts before it reveal a violation of the rights of the author and her minor son O.W. under article 2, read in conjunction with article 1 and articles 5 (a) and (b), and 16 (1) (d), of the Convention, and makes the following recommendations to the State party:

(a) Take steps to ensure that the central judicial authority of the State Party, namely its Ministry of Justice, promptly collaborate with the Austrian central authority in order to ensure the immediate return of O.W. to the author in Austria, where, if necessary, new proceedings concerning his custody and visitation may be conducted in the best interests of the child.

(b) In general:

(i) Take all appropriate measures to avoid reoccurrence of similar violations in the future;

(ii) Review and amend the Act on Parental Responsibility so as to ensure that (a) the requirement to consider the child's best interests as a primary consideration in all actions or decisions that concern him or her, both in the public and private sphere, is reflected both as a substantive right and as a rule of procedure, and (b) that the "best interests of the child" principle applies to all administrative and judicial proceedings, whether staffed by professional judges or lay persons or other officials in all procedures concerning children, including conciliation, mediation and arbitration processes;

(iii) Develop legal principles which fully comply with the rule of law, and ensure that the justice system provides for a robust and effective appellate system in order to correct both legal and factual errors, especially in custody cases and the determination and assessment of the principle of the best interests of the child;

(iv) Conduct a comprehensive review based on research of Danish custody law and the Act on Parental Responsibility, in particular assessing its impact on foreign parents, especially foreign mothers;

(v) Combat all negative attitudes and stereotypes which foster intersecting forms of discrimination against women, especially mothers of foreign nationality and ensure the full realization of the rights of their children to have their best interests assessed and taken as a primary consideration in all decisions;

(vi) Design specialized and mandatory training programmes for judges, prosecutors and lawyers as well as other professionals involved in administrative and judicial proceedings on the dynamics of violence against women, custody and visitation rights and the "best interests of the child" principle, non-discrimination against foreign nationals and gender stereotypes in order to equip them with the necessary knowledge and skills to discharge their duties in conformity with the State party's international obligations.

7. In accordance with article 7 (4), the State party shall give due consideration to the views of the Committee, together with its recommendations, and shall submit to the Committee, within six months, a written response, including any information on any action taken in the light of the views and recommendations of the Committee. The State party is also requested to publish the Committee's views and recommendations and to have them translated into Danish and widely disseminated in order to reach all relevant sectors of society.

Attachment

Opinion of Committee member Patricia Schulz (dissenting)

The Committee was faced with an extremely complex case, in which both parents of a child, went to the highest courts of their respective countries in order to obtain sole child custody, both faced criminal proceedings at some point and contradictory custody decisions were rendered in both countries. The Committee was faced with conflicting laws and conflicting judgments on the custody of a child: this was and remains at the heart of the communication, and, in my view, sex discrimination was alleged by the author in order to obtain a further examination of the case.

If I am not mistaken, the author had legal aid during the proceedings before the Danish authorities, and it is only at the stage of the communication that she had no counsel. This should have been better taken into consideration when assessing her allegations, regarding the actions and omissions from the State party authorities that she criticizes. Indeed, having counsel, the author has been in a position to defend her rights throughout the proceedings and could have received support also to properly substantiate her allegations.

Although some of the reasons leading me to a dissenting opinion are already present in the decision on admissibility, taken in November 2014 (CEDAW/C/59/D/46/2012), I will concentrate on the argumentation on the merits contained in the present decision (CEDAW/C/63/D/46/2012), from paragraph 4.5 to the end.

Two reasons brought me to present a dissenting opinion.

1. Biased assessment of allegations/information in favour of the author and reversal of the burden of proof

I find that the decision assesses the information provided and/or alleged by M.W. in a more favourable light than that from the State party. M.W. has repeatedly criticized the Danish authorities, in a sweeping fashion, for various acts or omissions but did not bring clear substantiation, in my eyes, to justify a consideration on the merits.

However, the Committee accepted these allegations. It did not consider that the Danish authorities had provided sufficient explanation with regard to all the proceedings held and the procedures under Danish laws, either regarding the aspects of violence or the custody issue.

1.1. On the issue of violence

The author claimed that the Danish authorities did not protect her properly from the violence of S. against her, and accused the police and prosecutors of failing to act or of acting inadequately, or during the kidnapping of O.W and that she was arrested and detained in a fashion that amounted to a denial of justice (inhuman and degrading treatment). These allegations are of a grave nature.

In paragraphs 4.5 to 4.8, the various allegations are detailed concerning the verbal and physical violence and the stalking and harassment that S. inflicted on the author, the inhuman and degrading treatment that the author received during her

detention, the violent kidnapping of the child by S and the lack of protection by the police and prosecutors.

I consider that the author did not bring the proof needed for such grave allegations against the functioning of the Danish police and prosecution in her case; there is no proof that she tried to lodge a complaint (or complaints) against S.; no proof either of complaints against the police or other authorities which she claims failed to act and/or that the police had refused to do so or that she herself had been brutalized by the police or prisons guards; there is no evidence of any such grave allegations. Yet the State party has a procedure — through the Independent Police Complaints Authorities — that is open for persons wanting to complain about such acts; the author had counsel to support her.

Although there is no trace in the file showing that the author tried to report the various aspects of the alleged dysfunctioning of the police or prosecution, the Committee treats all the allegations of the author as proven facts and dismisses the detailed explanations given by the State party regarding the reasons for and the conditions in which the arrest and detention were carried out, and the regular action of the police, prosecutors and other services (see paras. 2.2, 2.3, 2.7, 2.10, 2.11 and 2.12).

In paragraph 4.7 the Committee "observes that the State party has itself failed to provide detailed information and documents concerning the acts and omissions of the police, especially the authors' arbitrary arrest and detention on 6 and 7 September 2010". It considers that it was difficult for the author, as a foreigner, and from Austria (after she left Denmark), to provide proof of certain acts or omission by some State authorities — but the lack of any evidence that she had at least tried to obtain the documents that she says she requested from the Danish authorities is not counted against her.

The Committee then goes on in paragraph 4.7 to reproach the Danish authorities for having also engaged in a series of wrongful acts and doings", a summary of the complaints of the author being presented to conclude that the State party has failed to exercise due diligence regarding the violence alleged.

The reasoned arguments of the State party convinced me (see paras. 2.2, 2.3, 2.7, 2.10, 2.11 and 2.12) that there has been no violation of article 1 or 2 (d) of the Convention. I also note that it is probably impossible for a State party to provide negative proof against allegations made by an author, that is, the proof that acts or omissions have not happened; the absence of any evidence — when some could have been provided in this case had the author written to request action, copies of documents, protest against the treatment she says was inflicted on her — that these acts might have taken place should not be to the advantage of the author but to that of the State party.

1.2. On the issue of custody

The list of acts constituting "a series of wrongful acts and doings" in paragraph 4.7 also concerns the alleged failure of the State party to prevent the judiciary and social services (and kindergarten) from acting in a discriminatory way in the custody issue. The Committee takes as fact that the judiciary and social services neglected their duties and also acted in a discriminatory fashion, and even that some persons lied (the kindergarten employee supposed to be very close to S.).

Here again, the detailed answer of the State party, for instance its reminder of the date from which the author no longer had to fear being detained and thus being able to go to Denmark and take part in the proceedings, or its explanation of how the court system functions in the country for custody cases, with the involvement of social services, and how it functioned in this case specifically, with the presentation of all the steps taken by the various Danish authorities, is neglected.

I do not see either what violations of the rights of the author under article 5 (a) and/or 16 (1) (d) have been committed. The author repeatedly refused to avail herself of the procedure that would have allowed her access to her son, access that the Danish authorities were willing to provide following the interim measures recommended in the decision of 2014 on admissibility, as they made abundantly clear (para. 2.14). The author did not explain why she refused to respect the procedure that is in place in the State party and of which she was repeatedly made aware by the Danish authorities. She should therefore not have been allowed to invoke this to her own advantage when she, in effect, wanted the State party to violate its own rules and provide her with a possibility that is not open to anyone else. Yet the Committee accepted her version on this account also in paragraph 4.12, further proof in my eyes of its biased assessment of the allegations and information in favour of the author and the reversal of the burden of proof.

2. Role of the Committee and need not to go beyond its competence and substitute itself for the national authorities nor attempt to rewrite the rules on judicial organization

I cannot concur either with what I see as the Committee's interfering in the very complex case, as seen in paragraph 4.8, when it affirms that "the Danish authorities have also engaged in a series of wrongful acts and doings, inter alia the transfer of custody of O.W. albeit temporary"; the Committee lists a whole series of the wrongdoings by the State party in the civil aspects of the case, that is, the custody itself and the access to the child following the interim measures. This interfering in the custody case continues in paragraphs 4.10 to 4.13.

These paragraphs, 4.10-4.13, are focused on the "paramount consideration of the best interest of O.W as well as the legal rights of the author as the rightful custody holder" and the discriminatory treatment of M.W. "as a women and as a foreign mother". In my eyes, the Committee substitutes its views for those of the Danish authorities and enters into a detailed discussion of what the paramount interest of the child means and how the legal proceedings dealing with the custody of the child should have been conducted; it also includes a refutation of the "general public importance rule". I find this discussion only artificially, and insufficiently, linked to the sex discrimination the author alleges; the discussion is contrary to what the Committee affirms in paragraph 4.3 it should not be doing, that is, substituting its views for those of the national authorities — in a case where the strict conditions for doing this are not fulfilled, in my view.

The issue of access to justice is discussed in paragraphs 4.14-4.15, which partially repeat some of the elements previously addressed under another heading (allegations of violence and violation of articles 1 and 2 of the Convention). In view of the explanations the State party gave on the possibilities for the author to defend herself and on the judicial system of the country, I cannot concur with the conclusion that the author's access to justice was curtailed. Indeed, in paragraph

4.16, calls into question the system of appeals: the argument presented that "the custody of a minor child of tender age" amounts to a case where the "general public importance rule" should apply is disconcerting, and does not relate to sex-based discrimination. Not every tragic individual case of custody fulfils the condition of "general public importance rule", and not every case of poor treatment of a female claimant amounts to discrimination based on sex, or foreign nationality or the intersection of both grounds.

Further, as explained above in the last paragraph of 1.2 regarding alleged violation of articles 5 (a) and/or 16 (1) (d), the author refused to use the regular procedure put at her disposal, and of which she was repeatedly made aware by the Danish authorities, to access her son in accordance with the recommendation on interim measures.

In addition, the second part of paragraph 4.15 should have led the majority to another conclusion, which would have been that it has no competence to engage in a case involving, as the State party argued in paragraph 2.2, "two recognized and equal legal systems (that) have made contradictory decisions concerning custody of the son"; the Committee should have heeded the reminder that it "is not a supranational body with the task of ruling on disagreements between such recognized and equal legal systems". Further, the State party had, in my view, given ample examples of the care with which it had examined the various aspects of the issues related to custody and access to the child.

I therefore find that, although it is stated in paragraph 4.3 that the Committee "does not replace the national authorities in the assessment of the facts and evidence, unless the assessment was clearly arbitrary or amounted to a denial of justice", the Committee has forgotten this rule of prudence and this proper understanding of its role, function and competence. Despite that fact that, in my eyes, the author has not substantiated the various acts and/or omissions amounting to arbitrary discrimination or denial of justice, and the Committee has substituted itself for the national authorities and entered a hugely complicated case of child custody under the guise of sex discrimination.

3. Conclusion

I do not mean to say that there were no problems, that S. was right to get his son in Austria and that the Danish authorities did everything right: certainly not. In particular I find the State party's argument concerning whether S. unlawfully retained O.W. after kidnapping him in Austria very weak see para. 2.7). I also wonder if the decision to deprive the author of access to information regarding her son on the ground that "the author published any and all information on the son on various Internet pages, campaign sites and Facebook" (see para. 2.6) took into consideration what S. may have also done in this regard?

However, what I mean to say is that, on the basis of the allegations made by the author and the information that she provided and the answers by the State party, the Committee was not in a position to interfere in the complexity of this tragic case, as there is not enough substantiation to indicate that the State party has committed sex discrimination amounting to arbitrariness or denial of justice.

I therefore cannot concur either with the approach adopted by the Committee, which has practically reversed the burden of proof, requesting the State party to

disprove the allegations of the author, instead of asking the author to prove her allegations or at least substantiate them, or with the result of what I see as a biased approach.

In view of the foregoing, I believe that the communication should have been rejected on the ground that the author has failed to substantiate her numerous allegations against the State party.